85-826

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

BROOKHAVEN NATIONAL LABORATORY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAELA BERESTEANU GOLIN
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Petitioner, pro se

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UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of APRIL, One Thousand Nine Hundred and Eighty-five.

PRESENT:

HON. J. EDWARD LUMBARD,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. RICHARD J. CARDAMONE,
Circuit Judges.

- - - - - - - - - - - - - - -x

MICHAELA BERESTEANU GOLIN,

Appellant,

v.

ORDER
84-7154

BROOKHAVEN NATIONAL LABORATORY,

Appellee.

- - - - - - - - - - - - - - -x

Michaela Beresteanu Golin appeals from a judgment of the United States District Court for the Eastern District

of New York (Platt, J.) dismissing, after a non-jury trial, her claims of sexual harassment and sex discrimination under 42 U.S.C. § 2000e *et seq*. ("Title VII").

We affirm substantially for the reasons set forth in the district court's Memorandum and Order dated January 26, 1984.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Hon. J. Edward Lumbard

Hon. Ellsworth A. Van Graafeiland

Hon. Richard J. Cardamone

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAELA BERESTEANU GOLIN,	:	81 Civ. 1209
Plaintiff,	:	MEMORANDUM AND ORDER
-against-	:	
BROOKHAVEN NATIONAL LABORATORY,	:	January 26, 1984
Defendant.	:	

Platt, D.J.:

Plaintiff, Michaela Beresteanu Golin, has brought this action against defendant, Brookhaven National Laboratories ("Brookhaven"), on the grounds that Brookhaven discriminated against her on the basis of her sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1976). This case was tried before the undersigned on April 4, November 30, December 1 and December 7 of 1983. The

following constitute this court's findings of fact and conclusions of law, pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACT

1. Plaintiff was employed by Brookhaven as a Research Associate in the Nuclear Theory Group of the Physics Department from October 1, 1976 to December 31, 1978 (Trial Transcript ["Tr."] p. 29[1])

2. Brookhaven is an institution engaged in advanced, multi-disciplinary scientific research in such areas as nuclear physics, electronics and chemistry and is located in Upton, Long Island, New York (Tr. p. A-5).

3. Dr. Golin was granted a Bachelor of Science (B.S.) degree in physics from the State University of Sao Paulo, Brazil in 1969, a Master of Science (M.S.)

degree in physics from the University of Pittsburgh in 1970, and a Doctor of Philosophy (Ph.D.) degree in physics from Rutgers University in 1975 (Tr. pp. 29-30).

4. During her graduate education, Dr. Golin specialized in the field of nuclear theory, which consists of three areas: low energy, intermediate energy and high energy (Tr. pp. 30-31).

5. Upon receiving her doctoral degree in physics, Dr. Golin was employed as a post-doctoral research associate in nuclear theory at Florida State University from September 1975 through September 1976 (Tr. p. 32).

6. The position of post-doctoral research associate is a junior, entry-level, training position, which is customarily held by an individual for one, two and occasionally three years at any one institution (Tr. p. 9). A post-

doctoral physicist customarily obtains two or more such research associate positions at several institutions before securing a regular staff position as a research scientist (Tr. p. 9).

7. In May 1976, Dr. Golin wrote to Brookhaven and expressed an interest in being considered for a post-doctoral research associate position (Tr. p. A-91). Dr. Sidney H. Kahana, the Group Leader for Nuclear Theory in the Physics Department of Brookhaven responded by asking her to complete application forms and submit letters of reference. (Def. Ex. C).

8. The normal interviewing season for research associate positions at Brookhaven is January - March (Tr. p. A-92). During the first three months of 1976, Brookhaven's Nuclear Theory Group identified approximately five leading candidates for the position of Research

Associate (Tr. p. A-90). No offers were made to any of these candidates because Brookhaven's funding from the Department of Energy ("DOE") for the coming year was uncertain (Tr. p. A-91). When Dr. Golin's application was received in May 1976, Brookhaven's normal interviewing season was over (Tr. p. A-92).

9. In July 1976, Brookhaven received final approval of funding for the Physics Department and at that point knew that funds would be available to support a Research Associate in Nuclear Theory for the year beginning October 1976 (Tr. p. A-91). By July 1976, the five outstanding applicants previously identified by Brookhaven had obtained positions elsewhere and were unavailable (Tr. p. A-91).

10. By letter dated August 31, 1976 (Def. Ex. B), Dr. Nicholas P. Samios, who was at that time Chairman of the Physics Department, offered Dr. Golin the

position of Research Associate in the Physics Department for a one-year term expiring October 4, 1977. Dr. Golin accepted the position in September 1976 (Tr. p. 40).

11. As part of its normal orientation process, Brookhaven distributes a Scientific Staff Manual (Def. Ex. A) to all new professional appointees (Tr. p. A-19).

12. The post-doctoral Research Associate position that Dr. Golin held is described in the Manual (at p. 5) as follows:

> "Appointments as Research Associates may be made to unaffiliated scientists and engineers who have recently received their docotral [sic] degrees. These appointments are made for terms of one or two years from their effective date. Research Associate appointments are normally limited to a total effective duration of two years; however, when warranted, an extension to three years can be made with the Director's approval. At the expiration of an appointment as Research Associate, the individual is expected to find employment at another institu-

tion. Research Associates are eligible, however, for term appointments in competition with candidates from other institutions."

13. All Research Associates in the Physics Department are appointed for an initial term of one year and, absent unusual circumstances, reappointed for a second year (Tr. pp. A-24-25). Dr. Kahana told Dr. Golin prior to her August 1976 interview that it was unlikely that her appointment would exceed two years (Tr. p. A-93).

14. Occasionally, the appointment for a Research Associate who is employed in experimental physics is renewed for a third year, because it is sometimes impossible in the experimental area to complete a highly complex experiment in two years (Tr. p. A-17). Such an extension requires approval by both the Chairman of the Physics Department and Brookhaven's Director (Tr. p. A-9). This

type of extension has never been given to Research Associates who, like Dr. Golin, work in the theoretical, as opposed to experimental, discipline (Tr. p. A-17).

15. Upon termination of their two-year appointments, Brookhaven's Research Associates normally obtain positions at other institutions (Tr. p. A-12). In the Physics Department, approximately 10% of all Research Associates have been promoted to permanent positions on Brookhaven's scientific staff. In the Nuclear Theory Group, only one individual has been promoted from Research Associate to a scientific staff position since 1970 or before (Tr. p. A-22).

16. As a Research Associate, Dr. Golin was permitted to pursue her own research projects or to collaborate with other members of the Nuclear Theory Group (Tr. p. A-100).

17. As Group Leader, Dr. Kahana was

Dr. Golin's immediate supervisor. While Dr. Kahana had no special authority over Dr. Golin's work or employment status, he was responsible for recommending any personnel change in his department (Tr. pp. A-88; A-101). Dr. Kahana was one of three senior scientists in the Nuclear Theory Group, the other two being Dr. Joseph Weneser and Dr. Carl Dover (Tr. p. A-89). Dr. Kahana did not assign work to Dr. Golin or control with whom she collaborated (Tr. p. A-101).

18. During the first few months of her employment, Dr. Golin worked primarily on her own research projects (Tr. pp. 42, 51, 81). During this period, Dr. Golin has only intermittent contacts with Dr. Kahana. For the most part, such contacts occurred when she sought out Dr. Kahana's advice. The comments he made on her work during this period were, according to Dr. Golin, constructive and helpful and she

was grateful for his guidance (Tr. p. 51).

19. In December 1976, Dr. Kahana and Dr. Dover each offered Dr. Golin an opportunity to work with them on their respective research projects. Dr. Golin chose to work with Dr. Kahana. Consequently, beginning in January 1977, Dr. Golin and Dr. Kahana met more frequently to review her work (Tr. p. 84).

20. Dr. Golin collaborated with Dr. Kahana from January through approximately April 1977 (Tr. pp. 53; A-108). Dr. Golin alleges that during this period of time she was subject to sexual harassment by Dr. Kahana (Tr. pp. 54-58). The events complained of were of three types: Nudges by Dr. Kahana's knee or elbow at staff meetings, in the cafeteria or while collaborating; remarks which Dr. Golin interpreted to be of a sexual or provocative nature; and an incident of touching

or pointing to Dr. Golin's waist line in connection with her comment about cafeteria food causing her to gain weight (Tr. pp. 55-58; A-109-113; A-123-28). In view of our conclusions of law, we do not find it necessary to decide whether or not any of the alleged incidents of harassment actually took place.

21. In April 1977, Dr. Golin withdrew from active collaboration with Dr. Kahana on his research project (Tr. p. A-108). Dr. Kahana was very critical of some of the work that Dr. Golin had performed for him (Tr. p. A-106-07). According to Dr. Golin, his criticism of her work was unfair (Tr. p. 51).

22. Dr. Golin did not complain about sexual harassment or any personal problems with Dr. Kahana to anyone with supervisory responsibilities at Brookhaven at any point during 1977 (Tr. p. 97). Specifically, Dr. Golin did not

complain to Dr. Samios, the Physics Department Chairman, or to Dr. Martin Blume, the Assistant Chairman of the Physics Department with primary responsibility for personnel matters. Dr. Golin never complained to Brookhaven's affirmative action personnel (Tr. p. 97) though the availability of such avenues of redress were well publicized in Brookhaven's Equal Employment Opportunity Policy Statement (Def. Ex. G) and other sources (Tr. pp. A-35-36).

23. In April 1977, Dr. Kahana recommended Dr. Golin for a one-year extension of her initial appointment (Tr. p. A-24). On May 3, 1977, Dr. Golin's appointment as a Research Associate in the Nuclear Theory Group was extended for a second year, to expire on October 4, 1978 (Tr. pp. A-25; 53).

24. In the Fall of 1977, Dr. Kahana spoke with Dr. Golin to remind her that

her position as Research Associate was a temporary, training position which would end at the conclusion of her second year and that she should, therefore, begin making inquiries at other institutions for employment beginning in October 1978. Dr. Kahana made it a practice to remind Research Associates in the Nuclear Theory Group of the termination date of their appointments to allow them adequate time to seek new employment at other scientific institutions (Tr. pp. A-117-18).

25. Subsequently, Dr. Golin discovered that Dr. D. J. Millener, who had been hired by Brookhaven as an Assistant Physicist, was being advanced to Associate Physicist (Tr. pp. 55; A-118). Dr. Millener's advancement was based entirely on his own ability and was unrelated to Dr. Golin's employment at Brookhaven.

26. Dr. Millener had been originally hired as a member of the scientific

staff, which, unlike Dr. Golin's position, was a "tenure-track" appointment (Tr. pp. A-12-16). His advancement to Associate Physicist was in accordance with the normal progression of Brookhaven's staff personnel (Tr. p. A-44).

27. Dr. Millener's advancement did not create a vacancy on the regular staff, since the number of staff positions available at any time depends on the total budget allocation. Dr. Millener's advancement did not increase the number of budgeted staff positions in the Physics Department. From the Fall of 1977 through Dr. Golin's termination in December 1978, there was no vacancy in the Nuclear Theory staff to which Dr. Golin could have been promoted (Tr. pp. A-47-48).

28. There was no causal connection between any personal difficulties Dr.

Golin may have had with Dr. Kahana and her opportunities for advancement at Brookhaven. Dr. Kahana did not have the authority to promote Dr. Golin to the scientific staff or to extend her appointment for a third year (Tr. pp. A-9-10).

29. In December 1977, Dr. Golin met, at her request, with Dr. Samios and Dr. Blume. At that meeting, Dr. Golin stated her disagreement with the decision not to extend her Research Associate appointment for a third year. Dr. Samios and Dr. Blume offered to review that decision. Dr. Golin told Dr. Samios and Dr. Blume at this December meeting that she thought that Dr. Kahana's evaluation of her work was unfair; she did not tell them that she had any problems is her personal relationship with Dr. Kahana and made no mention of harassment, sexual or otherwise (Tr. pp. A-27-29).

30. Immediately following the December meeting, Dr. Samios and Dr. Blume conducted an independent review of Dr. Golin's work. Dr. Golin's work was discussed individually with each of the three senior scientists of the Nuclear Theory Group--Dr. Weneser, Dr. Kahana, and Dr. Dover--who all agreed that Dr. Golin, though hardworking, showed no particular originality, depth of insight, or promise of future contribution to scientific research. None of these individuals recommended that Dr. Golin's postdoctoral appointment be extended or that she be promoted to the regular staff (Tr. pp. A-29-32).

31. Dr. Blume and Dr. Samios also reviewed some of Dr. Golin's publications. They both concluded that the assessment of the Nuclear Theory Group was consistent with the quality of Dr. Golin's published work (Tr. p. A-32).

32. With the full concurrence of Dr. Blume, Dr. Samios determined that there was no basis to Dr. Golin's claim that she had been evaluated unfairly or that she was entitled to a promotion to a regular staff position (Tr. pp. A-31; A-69).

33. In February 1978, Dr. Samios and Dr. Blume met with Dr. Golin to advise her that they had completed their review and had concluded that there was no merit to her claim that she should be promoted or given an additional one year appointment as a Research Associate. Dr. Samios and Dr. Blume offered to assist Dr. Golin in finding a position at another institution (Tr. p. A-32).

34. At the February 1978 meeting Dr. Golin alleged that she was being harassed by Dr. Kahana. She had never previously made this claim to either Dr. Samios or Dr. Blume. Dr. Blume asked her what she meant by harassment. Dr. Golin responded

that the harassment was Dr. Kahana's reminders that she should be seeking employment at other institutions. She did not claim at this time that the harassment was sexual in nature (Tr. pp. A-33-5;A-70).

35. Because of Dr. Golin's complaints in early 1978 that Dr. Kahana was unfairly critical of her work, it was decided that for the remainder of her appointment at Brookhaven she would work under the direction of Dr. Weneser, who had previously been a Group Leader in the Nuclear Theory Group (Tr. p. A-34).

36. Following the February meeting, efforts were made by Dr. Blume, Dr. Weneser and Dr. Dover to assist Dr. Golin in finding subsequent employment both at other institutions and in other departments at Brookhaven (Tr. pp. A-33; A-70-3).

37. In late June 1978 Dr. Golin, at

her request, met with Dr. Samios and Dr. Blume. Dr. Golin stated that she had learned that an affirmative action representative from the DOE would be coming to Brookhaven and that she wanted to speak to him about the sexual discrimination and sexual harassment she had allegedly experienced. This was the first time Dr. Golin alleged to Dr. Blume or Dr. Samios that she had been subject to sexual harassment by Dr. Kahana (Tr. pp. A-34; A-73-4).

38. Dr. Golin never made any claims of sexual harassment or sexual discrimination until more that six months after she had been notified by Dr. Kahana that her employment at Brookhaven would terminate in October 1978. Indeed, Dr. Golin stated at trial that prior to Dr. Kahana's telling her in late 1977 that her appointment would not be renewed, she was not sure whether Dr. Kahana's prior conduct

had any sexual connotations (Tr. p. 55).

39. Dr. Samios and Dr. Blume asked Dr. Golin to identify the nature of the sexual harassment, but Dr. Golin would not give any specifics (Tr. p. A-34). In addition, Dr. Samios and Dr. Blume advised Dr. Golin that she should communicate directly to Brookhaven's Director, Dr. George H. Vineyard, concerning her allegations of sexual harassment (Tr. p. A-74). Neither Dr. Blume nor Dr. Samios attempted to dissuade Dr. Golin from speaking to the DOE affirmative action representative. Dr. Golin does not so allege.

40. Immediately following the June 1978 meeting with Dr. Golin, Dr. Samios and Dr. Blume met with Dr. Kahana to discuss her charges of sexual harassment. Dr. Kahana denied emphatically that he had ever sexually harassed Dr. Golin, and he asked for details of her allegations.

Dr. Blume and Dr. Samios replied that Dr. Golin had refused to provide any specifics (Tr. pp. A-36-7; A-75).

41. By letter dated July 1, 1978, Dr. Golin wrote to Dr. Vineyard objecting to the decision to terminate here appointment (Pltf. Ex. 10). The July 1 letter is the first written statement to defendant by Dr. Golin alleging sexual harassment or sexual discrimination by Dr. Kahana.

42. In the July 1 letter, Dr. Golin alludes to Dr. Millener's promotion and speculates that the decision was "motivated by personal revenge." However, the decision as to Dr. Millener was unrelated to Dr. Golin's employment status at Brookhaven and was not a decision that Dr. Kahana could make on his own (Tr. pp. A-15-16).

43. Dr. Golin further alleges in her July 1 letter that other women at Brookhaven "have been molested" by Dr.

Kahana. No female other that Dr. Golin ever communicated to any Brookhaven supervisors or managers that Dr. Kahana had allegedly engaged in sexual harassment towards them (Tr. p. A-38).

44. Dr. Vineyard did not receive Dr. Golin's letter until late July, because he was out of town. When he returned to Brookhaven, Dr. Vineyard promptly responded to Dr. Golin's allegations of sexual discrimination by letter of August 1, 1978 (Def. Ex. D). In that letter, Dr. Vineyard advised Dr. Golin that he would appoint a Committee to investigate Dr. Golin's allegations of sexual harassment. That Committee was appointed on August 11, 1978 (Def. Ex. H).

45. The Committee made arrangements for a hearing to take place later in August. On August 23, 1978, Dr. Vineyard received a letter from Dr. Golin's attorney (Def. Ex. E) stating that Dr. Golin

would not participate in the scheduled hearing on the ground that the Committee's investigation was limited to her allegations of sexual harassment by Dr. Kahana and would not extend to Dr. Golin's claim that she should have been promoted. Because of Dr. Golin's refusal to cooperate with the Committee, Brookhaven's investigation of her sexual harassment allegations was discontinued (Tr. p. A-38).

46. In September 1978, Dr. Samios met with Dr. Golin to determine what progress she had made in seeking new employment, and Dr. Golin stated that she was not exploring other employment opportunities (Tr. p. A-39). By letter dated September 21, 1978 (Def. Ex. I), Dr. Samios gave Dr. Golin a three-month extension of her employment through December 31, 1978 so that she would have more time to look for a new job. In granting the extension, Dr.

Samios stated that the extension was final. No further extensions of Dr. Golin's appointment were made.

47. For approximately nine months following her termination, Dr. Golin continued to work with research scientists on Brookhaven's staff and to use Brookhaven facilities. Dr. Golin had no permission from Brookhaven to engage in this activity, nor did she make any effort to obtain the proper authorization, although she believed she was permitted to use the facilities (Tr. p. 65).

48. In November 1979, Dr. Golin began work as a programmer-analyst for the FMC Corporation in New Jersey. Her starting salary in that position was $25,800, which exceeded by more than $10,000 the highest salary she had earned as a Brookhaven Research Associate (Tr. p. 66).

CONCLUSIONS OF LAW

1. The plaintiff has complied with all preconditions necessary to bring this civil action, founded upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. (1976), against defendant.

2. This court has jurisdiction over the subject matter and of the parties to this action in accordance with 42 U.S.C. § 2000e-5(f)(3) (1976).

3. A plaintiff alleging employment discrimination in violation of Title VII by virtue of a denial of employment or promotion must carry the initial burden at trial of establishing a *prima facie* case of discrimination by presenting concrete facts showing that plaintiff (1) belongs to a protected class; (2) has applied for and was qualified for a job or promotion sought; (3) was rejected for the position despite his or her qualifi-

cations; and (4) that the position remained open or was filled by non-minority applicants. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Where termination rather than a denial of an employment opportunity is alleged, the plaintiff's prima facie case requires a showing that the plaintiff (1) belongs to a protected class; (2) satisfied normal requirements of his or her work; and (3) was replaced by a non-minority individual or, if not replaced, that non-minority workers with comparable records were recruited when plaintiff was terminated. Richardson v. Sunmark Industries, 560 F. Supp. 733, 736 (E.D.N.Y. 1983).

4. Only after the plaintiff succeeds in establishing a prima facie case in the first instance is the employer required "to articulate some legitimate, non-discriminatory reasons" for its actions, McDonnell Douglas Corp. v. Green, supra,

411 U.S. at 802. Thereafter, the plaintiff must prove "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L.Ed. 2d 207, 209 (1981) (footnotes omitted.)[2] "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with plaintiff." Id.

5. An employee alleging sex-based discrimination under Title VII by virtue of sexual harassment must establish either (1) that the employee suffered an adverse employment decision or loss of a tangible job benefit as a consequence of his or her response to sexual harassment or (2) that the sexual harassment was of

such nature and magnitude as to create a hostile, intimidating or offensive working environment that substantially impaired the employee's job performance or psychological well-being. Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Cummings v. Walsh Construction Co., 561 F.Supp. 872 (S.D. Ga. 1983); Ferguson v. E.I. DuPont de Nemours & Co., 560 F. Supp. 1172, 1196-1199 (D. Del. 1983).

6. To establish a prima facie case of sexual harassment based on the denial of a tangible job benefit or adverse employment decision, it must be established that (1) the employee belongs to a protected group; (2) that the employee was subject to unwelcome sexual harassment;

(3) that the harassment complained of was based upon sex; and (4) that the employee's reaction to the harassment resulted in an adverse employment decision or loss or denial of a tangible job benefit. Henson v. City of Dundee, supra, 682 F.2d at 909; Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979). In the context of the denial of a promotion or renewal of appointment, the fourth element can be established by showing that the employee was eligible for the promotion or renewal and, within the context of the employer's actual practice, had a reasonable expectation of the promotion or renewal sought, Bundy v. Jackson, supra, 641 F.2d at 953.

7. To establish a prima facie case of sexual harassment based on a hostile work environment, it must be established (1) that the employee belongs to a protected group; (2) that the employee was subject

to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; (4) that the harassment was of such nature and magnitude as to affect a "term, condition or privilege" of employment and (5) that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. Katz v. Dole, supra, 709 F.2d at 255; Henson v. City of Dundee, supra, 682 F.2d 903-05; Bundy v. Jackson, supra, 641 F.2d at 943; Ferguson v. E.I. DuPont de Nemours & Co., supra, 560 F. Supp. at 1197-99.

8. Plaintiff has failed to establish a prima facie case of sexual harassment resulting in a tangible detriment to her employment because she failed to establish that such harassment resulted in an adverse employment decision. First, Dr. Golin had no reasonable expectation of the appointment extension or promotion

she sought. Extensions for a third year were rarely given by Brookhaven's Physics Department and never to Research Associates in the theoretical group where Dr. Golin was employed. Promotions from Research Associate to the regular staff, especially in the Nuclear Theory Group, were exceedingly rare (less than one in ten candidates) and were given only to exceptionally qualified individuals, which Dr. Golin was not. Second, since the decisions not to grant a third year extension or to promote Dr. Golin to the Physics Department's staff were independently reviewed and ratified by persons who had no involvement in, or at that time knowledge of, the alleged sexual harassment, there is no basis to find that Dr. Golin's response to the harassment, if it occurred, resulted in an adverse employment decision as to her.

9. Plaintiff has failed to establish

a prima facie case of sexual harassment predicated on the maintenance of a hostile work environment, because she has failed to establish that Dr. Kahana's superiors at Brookhaven in any way condoned or acquiesced in his alleged sexual harassment. First, as established in the findings of fact, Dr. Golin did not complain to Dr. Kahana's superiors at Brookhaven until after she was informed of their decision to sustain the employment determinations initially made by the Nuclear Theory Group. Even crediting Dr. Golin's versions of the facts, she made no complaint of sexual harassment to Dr. Samios and Dr. Blume until at least six months after the alleged sexual harassment had ceased. Second, although a showing of pervasive harassment can in an appropriate case give rise to a finding of constructive knowledge, Henson v. City of Dundee, supra, 682 F.2d at 905, no

such showing of pervasive harassment was made here. The findings of fact herein establish that, even crediting Dr. Golin's testimony, no other employee experienced such harassment or voiced any complaint. Third, it is undisputed that the Brookhaven officials did not condone sexual harassment and that they reacted promptly to Dr. Golin's complaints. Their efforts to investigate Dr. Golin's charges and, if necessary, to remedy her allegations were thwarted by Dr. Golin's own refusal to cooperate with Brookhaven's investigation. Since Brookhaven responded fairly and reasonably to Dr. Golin's complaints, it cannot "be held liable for the environment created by" Dr. Kahana's alleged sexual harassment. Ferguson v. E.I. DuPont de Nemours & Co., supra, 560 F. Supp. at 1199.

10. To the extent plaintiff alleges

sex discrimination not related to sexual harassment, she has also failed to establish a prima facie case. The evidence clearly shows that Dr. Golin was neither eligible nor qualified for a third-year extension of her post-doctoral Research Associate position. The position of Associate Physicist, to which Dr. Millener was advanced, was not a position for which Dr. Golin applied or was even eligible. Moreover, Dr. Millener's advancement did not create a vacancy on the regular staff of the Nuclear Theory Group to which Dr. Golin could have been appointed, assuming, arguendo, she was qualified.

11. Even if we assumed, arguendo, that plaintiff had made out a prima facie case of employment discrimination, which she has not, defendant has articulated legitimate, nondiscriminatory reasons for its decision not to extend Dr. Golin's

Research Associate appointment for a third year or to promote her to a position on the regular scientific staff, and plaintiff has not shown by a preponderance of the evidence that such reasons were a pretext for discrimination.

12. In light of our conclusion that there was no open positon [sic] at Brookhaven for which Dr. Golin was qualified, and that Dr. Kahana's superiors did not acquiesce in any alleged sexual harassment, we find that no conduct by any agent or employee of defendant was in violation, as to plaintiff, of any provision of Title VII of the Civil Rights Act of 1964, as amended.

13. To the extent that any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

14. The Complaint herein must be dismissed on the merits for failure to establish a prima facie case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.

15. Plaintiff's prayer for relief must be denied in all respects and judgment entered for defendant.

16. Settle judgment with costs and disbursements on notice.

SO ORDERED.

/s/ Thomas C. Platt
U . S . D . J .

F O O T N O T E S

1 References to testimony at trial will be made to the trial transcript. The transcript of April 4, November 30 and December 7, 1983, will be referred to as "Tr. p. __." The transcript of December 1, 1983, will be referred to as "Tr. p. A-__."

2 Although the Supreme Court has recently held that district courts should not be overly formal in their approach to employment discrimination suits, see U.S. Postal Service Board of Governors v. Aikens, U.S. ____, 103 S. Ct. 1478, ____ L.Ed. 2d ____ (1983), we believe that the framework of the McDonnell Douglas and Burdine cases, supra, is well suited to the disposition of this case.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 18th day of JUNE one thousand nine hundred and eighty-five.

- - - - - - - - - - - - - - - -

MICHAELA BERESTEANU GOLIN,

Plaintiff-Appellant,

v.

No. 84-7154

BROOKHAVEN NATIONAL LABORATORY,

Defendant-Appellee.

- - - - - - - - - - - - - - - -

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/
Elaine B. Goldsmith
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-189

MICHAELA BERESTEANU GOLIN,

Applicant,

v.

BROOKHAVEN NATIONAL LABORATORY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 15, 1985.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Section 703 of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e-2 (1981)
Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 704 of Title VII,
as amended, 42 U.S.C. § 2000e-3 (1981)
Other unlawful employment practices

Discrimination for making charges,
testifying, assisting, or participating
in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

FEDERAL RULES OF CIVIL PROCEDURE (1985)
Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the

court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

FEDERAL RULES OF CIVIL PROCEDURE (1985)
Rule 52. Findings by the Court

(a) Effect. [Effective until August 1, 1985.] In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be consid-

ered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

EEOC's GUIDELINES ON DISCRIMINATION BECAUSE OF SEX
29 C.F.R. § 1604.1-§ 1604.11 (1984)

§ 1604.11 Sexual Harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of

their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job junctions [sic] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow emloyees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and

appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's

submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

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[1] The principles involved here continue to apply to race, color, religion or national origin.

Executive Order 11246, as amended,
43 Fed.Reg. 49240, 49242 (1978);
41 CFR § 60 (1985)
§ 60-1.4 Equal opportunity clause.

(a) Government contracts. Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race,

color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitement or recruitement advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - -X

MICHAELA BERESTEANU GOLIN,

Plaintiff,

- against -

BROOKHAVEN NATIONAL LABORATORY,

Defendant.

81 Civ. 1209 (TCP)

STIPULATION OF CONTESTED ISSUES OF FACT AND OF LAW

- - - - - - - - - - - -X

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties herein, that the following is a listing of the contested issues of fact and of law in this action:

1. Whether plaintiff, by reason of her education, training and experience, possessed the requisite qualifications for a scientific staff appointment at defendant, Brookhaven National Laboratory.

2. Whether plaintiff was sexually harassed by her supervisor, Dr. Sidney

Kahana in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII").

3. Whether defendant failed to retain plaintiff and denied her promotion to a scientific staff position because of her sex in violation of Title VII.

4. Whether defendant's failure to retain plaintiff and to promote plaintiff to a scientific staff position was in retaliation for plaintiff's rejection of Dr. Kahana's advances and plaintiff's complaints about his sexual harassment of her in violation of Title VII.

5. Whether the procedures by which defendant decides to retain or appoint individuals to its scientific staff violate Title VII.

/s/ Sheldon Engelhard
Attorney for Plaintiff

/s/ Andrea S. Christensen
Attorney for Defendant

BROOKHAVEN NATIONAL LABORATORY
ASSOCIATED UNIVERSITIES, INC.,
UPTON, L.I., N.Y. 11973
DEPARTMENT OF PHYSICS
TELEPHONE: (516) 345-3748

July 1, 1978

Dr. George H. Vineyard, Director
Brookhaven National Laboratory
Upton, N.Y. 11973

Dear Dr. Vineyard,

I am writing to you, encouraged by your Equal Employment Opportunity Policy Statement of August 16, 1976.

I joined the Nuclear Theory Group at Brookhaven National Laboratory as a Research Associate on October 6, 1976. Since that time, I have worked on several important problems in many areas of Nuclear Physics. This can be seen in the 189 form which I am enclosing. In addition, I have been invited to give talks at the University of Iowa, at the University of Maryland and at the Florida State University. My work has generated a lot

of interest, and I have received letters from eminent Nuclear Theorists congratulating me and inviting me to collaborate with them. Additional work, performed in collaboration with Dr. S. Kahana, has been reported by him at the Tokyo Conference, at the Rochester Symposium on Heavy Ions and to the ERDA Visiting Committee.

In spite of my achievements, my appointment at this Laboratory will be terminated in October, 1978. The stated reason is that Research Associates are never promoted at BNL, although ample evidence points to the contrary.

When Dr. Kahana informed me of this decision, he also informed me that he had just promoted Dr. D. J. Millener. As Dr. Millener published little or nothing during his two year appointment, such a decision can only be motivated by personal revenge.

Dr. Kahana had been harassing me

sexually for several months, insisting that other women at the Laboratory were more "willing" than I was, and that I should be flattered by his advances. When I stated these facts to various staff members, Dr. Kahana became insulting.

I want to bring to your attention that I am not the only woman to have been molested by Dr. Kahana at BNL. Besides, one of our staff members mentioned that Dr. Kahana's intentions toward me were clear before I was hired. As a matter of fact, the position was never advertised, and this fact alone is a serious infraction of the Law.

I have already reported the above to Dr. N. Samios and to Dr. M. Blume, and I am aware of the fact that Dr. Samios has seriously reprimanded Dr. Kahana on his behavior.

Dr. Kahana's attitude toward me has been unfair and offensive. His decision

indicates the extent of his discrimination and his lack of respect for your Equal Employment Opportunity Policy Statement.

I trust that you will not tolerate such abuses at Brookhaven National Laboratory, and that I will not be forced into taking Legal Action.

Sincerely,

Michaela B. Golin

cc: Dr. N. Samios

BROOKHAVEN NATIONAL LABORATORY
ASSOCIATED UNIVERSITIES, INC.,
UPTON, L.I., N.Y. 11973
DEPARTMENT OF PHYSICS
TELEPHONE: (516) 345-3748

July 1, 1978

DR. N. Samios, Chairman
Department of Physics
Brookhaven National Laboratory
Upton, N.Y. 11973

Dear Dr. Samios,

Enclosed please find the copy of my letter to Dr. G. H. Vineyard. It is now clear to [redacted] that I have no alternatives.

Sincerely,

Michaela B. Golin

BROOKHAVEN NATIONAL LABORATORY
ASSOCIATED UNIVERSITIES, INC.
Upton, New York 11973

Office of the Director (516) 345-3335

August 1, 1978

Dr. Michaela B. Golin
Department of Physics

Dear Dr. Golin:

Please excuse my delay in replying to your letter of July 1, 1978. It was caused by my being out of town on business until this week, plus the need for a careful review of the matter.

In your letter you raise two issues which I believe are separate, and which I will address in turn. First, I have examined the procedures used by the Physics Department in reaching the decision not to extend your appointment. Since 1965 there have been 32 postdoctoral research appointments in theoretical physics (solid state, nuclear, and high energy

physics). Of this group, only two persons were subsequently appointed to staff positions. All of the others left after one or, at most two years, and, as such, your case is in conformity with the norm. This is consistent with policy as stated in the Scientific Staff Manual, page 5: "At the expiration of an appointment as Research Associate, the individual is expected to find employment at another institution." I also am assured that Dr. Kahana was not the arbiter of your extension. The decision was reached by a departmental review which involved extensive discussions between Dr. Samios and Dr. Blume, and other senior staff physicists. As a result, I find that the Department acted properly and regret to tell you that I find no reason to reverse their decision.

As to the issue that you have been harassed by Dr. Kahana, you make a

serious charge, independent of the issue of your appointment to the scientific staff. I am directing that this charge be investigated.

Sincerely yours,

George H. Vineyard
Director

bcc: R. C. Anderson
N. P. Rathvon
J. S. Washburne
N. P. Samios
R. R. Rau

CLARK WULF & LEVINE
113 UNIVERSITY PLACE
NEW YORK, N. Y. 10003
(212) 475-3232

RAMSEY CLARK
ALAN H. LEVINE
MELVIN L. WULF

August 23, 1978

Dr. George H. Vineyard
Director
Brookhaven National Laboratory
Upton, New York 11973

Dear Dr. Vineyard:

This firm represents Dr. Michaela Golin in connection with her charge of sex discrimination against Brookhaven National Laboratory.

Dr. Golin, you will recall, wrote you on July 1, 1978 and charged Dr. S. Kahana with sexually harassing her and charged the Physics Department with denying her a staff appointment because she resisted, and then complained of, his advances. In your August letter, you upheld the action of the Physics Department and promised an

investigation of Dr. Kahana's actions.

Subsequently, Dr. Rathvon invited Dr. Golin to appear before a staff committee which was investigating the charge of sexual harassment. When Dr. Rathvon confirmed to me that the committee was foreclosed from investigating the denial of her appointment, I told him that, on my advice, Dr. Golin would not appear.

Although I have no reason to believe that the committee's investigation would not be fair, the limited scope of its inquiry would preclude it from considering the equally serious allegation that the Physics Department, and by inference, the Laboratory had permitted sex discrimination to infect the staff appointment process.

I am sure that Physics Department members vigorously disputed that allegation in their discussions with you. Nonetheless, the record of the department

in the appointment of women to staff positions gives strong indication of sex bias. Both the Laboratory's Affirmative Action Plan and the recent Compliance Review by the Department of Energy document the failure of the Physics Department to hire and promote professional women. While it may be true that the Department faces "stiff competition" for the few available women (Affirmative Action Program, p. 53d), the treatment of Dr. Golin suggests that competition may not be the only explanation for the Department's underutilization of professional women.

In your August 1 letter, you advise Dr. Golin that since 1968, only two post-doctoral research associates have been appointed to staff positions in theoretical physics. However, there have apparently been a substantial number of such appointments in experimental

physics, thus suggesting that the Staff Manual Policy cited by you is no bar to considering Dr. Golin for a staff position.

I need not tell you that Dr. Golin's allegations, if proven, constitute a serious violation of Title VII of the Civil Rights Act of 1964. I and Dr. Golin would hope that this matter can be resolved without legal action. Towards that end, I would be happy to discuss the matter with you. I will be out of town next week. You may reach me here after Labor Day.

Sincerely yours,

Alan H. Levine

AHL:gg

BROOKHAVEN NATIONAL LABORATORY
ASSOCIATED UNIVERSITIES, INC.
Upton, New York 11973

Personnel (516) 345-2113

August 11, 1978

Ms. M. B. Golin
c/o Department of Physics
Brookhaven National Laboratory
Upton, New York 11973

Dear Ms. Golin:

The following is in answer to your request.

As of July 2, 1978, there are 160 employees with tenure on the Scientific Staff; two of them are women.

In addition Dr. T. Goldhaber has an emeritus appointment.

Very truly yours,

Joseph S. Washburne, Manager
Personnel and Labor Relations

Enclosure (4)

EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

Brookhaven National Laboratory is committed to a policy of Equal Opportunity in Employment and a program of Affirmative Action for achieving equality of opportunity. Our goal is equality of opportunity for all, in recruitement, hiring, training, and promotion, without regard to race, color, religion, national origin, sex, or non-limiting handicaps. The Laboratory's Affirmative Action Program for Fiscal Year 1977 defines specific responsibilities for the implementation of affirmative action objectives. The Laboratory will pursue this Affirmative Action Program with a significant, sustained, and broadly participatory effort keyed to the problems and needs of

minority groups and women, and directed toward finding, employing, and advancing women and minorities who can contribute to the Laboratory's work.

It is my long range objective to increase the number of women and minorities in areas of underutilization, through new hires, training, and encouragement, to reflect or exceed their composition in the work force.

I expect a commitment from all department and division heads, and I urge each employee to add his or her efforts toward making this program a success.

Mr. Harvey Thomas is my assistant for Affirmative Action and has the responsibility of recommending specific steps to achieve equality of opportunity. He also has the responsibility for

monitoring and reporting to me the progress of each part of the Laboratory. We have made advances we can be proud of, but much remains to be done.

/s/
George H. Vineyard
Director

August 16, 1976

Comparison of professional achievements of Dr. Michaela B. Golin and Dr. D.J. Millener.

PROFESSIONAL INFORMATION	M.B. GOLIN	D.J. MILLENER
Professional Experience	Shell Model (N. Structure) Cluster Model (N. Structure) Woods-Saxon Model (N. Reactions) Double Folding (N. Reactions) Resonances (N. Reactions)	Oxford SU(3) Shell Model Techniques
Nature of Appointment at Brookhaven National Laboratory	Temporary: (Postdoctoral Research Associate)	Temporary: (Assistant Physicist)
Number of prior postdoctoral appointments	1	1

Total Number of publications as of 1979 (*)	13	10
Total Number of BNL publications as of 1979 (*)	6	3
Number of Invited Talks at Conferences/Workshops from 1976 to 1979	2	1
Total Number of Citations (**) to work performed at BNL from 1976 to 1979	26	20

(*) - Excludes contributed papers and abstracts published in conference proceedings, and includes work submitted for publication.

(**) - The number of citations measures the interest generated in the field by the candidate's research. The quoted number of citations is cumulative through 1982. The data was obtained from the "Science Citation Index", published by the Institute for Scientific Information, Inc., 3501 Market Street, Philadelphia, Pennsylvania.